Supreme Court, U.S.
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No. 95-1038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEMOND CONSTRUCTION COMPANY,
Petitioner,

v.

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition challenges a $3.5 million damages award for the wrongful death of respondent's 13-year-old son, who was killed when petitioner's ongoing sewer repair work left the roadway pavement in an unsafe condition, with no warning signs to inform motorists that construction was underway.

The petition presents a single question: whether punitive damages may be imposed in wrongful death cases for "simple negligence." Pet. 26. Unlike many punitive damage cases, such as *BMW of North America v. Gore*, No. 94-896 (pending), this case does not present any question of excessiveness regarding the *amount* of a punitive award. Petitioner's argument does not depend on whether the damage award in this case was $3,500 or $3.5 million. Thus, petitioner "does not ask this Court to formulate guidelines" to judge the size of punitive damages, and petitioner forthrightly concedes that "it is demanding to agree on factors to govern punitive damages." Pet. 26. Accordingly, there would be no reason to hold the

petition in abeyance pending this Court's decision in *BMW*, and petitioner does not request such relief.[1]

Instead, petitioner asks this Court to grant plenary review. But such review would be inappropriate, for several reasons:

- Petitioner failed to raise its constitutional argument properly in the Alabama Supreme Court, and the court in fact declined to reach the issue for that reason, so that the judgment in this case rests on an adequate and independent state-law ground.
- In any event, the Alabama Supreme Court expressly held that this was not a "simple negligence" case, but rather involved wanton misconduct by petitioner. Thus, the question ostensibly raised by petitioner is not in fact presented by this case.
- There are further reasons that this wrongful death case is a poor vehicle to address punitive damages issues. The damages in this case are "punitive" in name only, because there is no provision for compensatory damages in Alabama wrongful death actions. Thus, the award here is not readily comparable to punitive awards in other types of lawsuits. And it is difficult to see how defendants are disadvantaged by the Alabama scheme, since punitive damages are subject to extensive procedural and substantive review, both as a matter of Alabama law and as a result of this Court's recent decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331

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[1] The case at bar has nothing to do with *BMW*. This is a wrongful death action for a 13-year-old child, not a fraud action for conduct allegedly involving little reprehensibility. The instant case presents no question of extraterritorial punishment and no question of multiple punitive awards for a single course of conduct. It presents no issue of a "ratio" between punitive and compensatory damages, since all damages in a wrongful death action are deemed to be "punitive" under Alabama law.

(1994). In most States, compensatory damages are subject to substantially less rigorous review. Thus, outside Alabama, a jury would have even greater discretion to impose a $3.5 million (or greater) award for the wrongful death of a child due to negligence. Furthermore, adopting petitioner's theory would have the anomalous result of effectively prohibiting *any* damages in Alabama wrongful death cases unless the defendant were guilty of intentional wrongdoing.

- On the merits, petitioner's claim has no merit and would require this Court to overrule a 70-year-old precedent which it only recently reaffirmed in *Haslip*. Petitioner's primary argument is an ill-conceived analogy between punitive damages and criminal punishments that this Court has repeatedly rejected.

The petition should be denied.

STATEMENT OF THE CASE

The petition contains a lengthy "Statement of the Case" which is in fact a jury argument seeking to minimize petitioner's own culpability for Christopher Wheeler's death. Petitioner's one-sided account, which tellingly is unaccompanied by any citations to the trial record, fails to inform this Court of the extensive evidence supporting the jury verdict and the decisions of the Alabama courts below. Indeed, petitioner's claims are in sharp contrast with the detailed findings of the Alabama courts on several crucial points. There could be no better sign that this case is unworthy of this Court's review than petitioner's need to re-argue facts found by the state courts.

1. *Christopher Wheeler's Wrongful Death.* Petitioner Lemond Contracting, Inc. entered into a contract with the City of Lanett, Alabama for the installation of sanitary sewer lines

in some of the city streets. Pl. Ex. 3.[2] As part of that project, in April 1992 work began on Magnolia Road. R. 1357.

At about 3:30 a.m. on Saturday, June 6, 1992, 15-year-old Jason Colley was driving his father's car on Magnolia Road between 17th Avenue and 18th Avenue when he lost control of the vehicle at the Lemond construction site. The car left the roadway and struck a tree. Chris Wheeler, a passenger in the front seat, was ejected from the auto and killed.

Jason and Chris were best friends who lived across the street from each other. R. 301-303. On the night in question, Chris was "sleeping over" at Jason's house. It was undisputed that the boys did not use any drugs or alcohol. R. 304; R. 184-85 (tests on both were negative for drugs and alcohol). The boys were to leave the next morning with Chris's parents for a trip to Florida. Pet. App. A2.

Sometime after midnight, Jason took his father's car keys from the breakfast bar in the home, and the two boys went riding with Jason driving. He did not yet have a driver's license. The children rode for about a half-mile before returning home without incident. Pet. App. A2. The boys went back to bed. Sometime later in the early morning hours, Chris awakened Jason, and the two decided to take the car for another drive. R. 307.

With Jason driving and Chris in the passenger seat, they again went riding around Lanett. R. 308-09. When Jason attempted to head in the direction of his home, he pulled into a left-turn lane to turn onto a highway marked "Do Not Enter." R. 310. Officer Craig Young of the Lanett Police Department, who observed Jason's car, testified that "then he backed his vehicle back out of the turning lane and went up and stopped at

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[2] References to plaintiff's trial exhibits are styled "Pl. Ex. _." References to the trial record are styled "R. __." References to the Appendix to the Petition for Certiorari are styled "Pet. App. _."

the red signal at the traffic light." R. 255. Officer Young added that the car did not back up "in a sharp manner" but just "[s]lowly backed out" of the turn lane. The police nonetheless decided to follow Chris and Jason. Officer Young came to the conclusion "that he may be lost." R. 255.

When the light turned green, Jason observed a police car following him. R. 310. The car was going between 35 and 45 m.p.h. *Id.* Jason turned off the highway onto 16th Street. The police car followed him and turned on its blue lights. R. 311. Jason reacted by "speed[ing] up a little bit." R. 312. Jason testified that he and Chris were scared and trying to get home. R. 333, 335. Jason made several turns until he was on Magnolia Road. R. 313. The fastest speed he reached was "[p]ossibly seventy miles an hour," before he crossed railroad tracks on Magnolia Road. R. 313. At the tracks, Jason hit a bump in the road and the car became airborne. This scared Jason "a lot" and he slowed down. R. 314. He took his foot off the accelerator as the car went up a hill past the railroad tracks. R. 315. *See* Pet. App. A2-A3 ("after crossing railroad tracks at a high speed, Jason became frightened and slowed down to 35 or 40 miles per hour").

At the railroad tracks, the pursuing police officer lost contact with Jason's car and cut off his siren. R. 1300-01. He testified that he called off the chase because he knew that at the top of the hill was the Lemond construction site. R. 1313. The officer added that he knew that the road was "under construction" and that if he drove his police car through the site he could "tear it up." R. 1316. But the officer agreed that an "unsuspecting motorist" would have no way of knowing that. R. 1322.

At the site, Lemond had erected no warning signs, cones, barricades, warning lights, or illumination or markings of any kind to caution nighttime drivers that construction was underway. R. 162, 315-16. As Jason's car reached the

construction site, it was going 35 to 45 miles per hour. R. 317; R. 330. The posted speed limit was thirty five. R. 162. Jason testified that "it was real rough and it was rocky and . . . I hit a hard bump, and that's when I lost control." R. 317. Police testimony based on "yaw marks" left by the tires in the roadway corroborated Jason's account of his loss of control. R. 178-79, 181-82, 183.

2. *Lemond's Wrongful Conduct.* The evidence demonstrated two elements of wrongdoing by Lemond that led to Chris Wheeler's death.

a. *The Unsafe Condition of the Road.* As a part of the sewer construction project, Lemond dug trenches across the road surface so that sewer pipe could be laid under the road. Pet. App. A4. Once the pipe was laid in the trench, the trench was filled with gravel to within a few inches of the road surface. *Id.* The last few inches of the trench were then filled with "crusher run," a form of crushed stone, prior to eventual final road resurfacing. *Id.*

The Alabama Supreme Court found that "crusher run" "can be dislodged from the trench by vehicular traffic." Pet. App. A4. Police testimony established that the trenches in the roadway at the construction site were approximately three feet wide. R. 154-55. According to the Alabama Supreme Court, the evidence also showed that "the trenches in Magnolia Road were as much as eight inches deep at the time of Chris's fatal accident and that in that condition the road was not safe to drive an automobile on." Pet. App. A4; *see also* R. 154-55, 170-71 (testimony of Officer Meigs); R. 257 (testimony of Officer Young); R. 368-69, 374 (testimony of Deputy Sheriff Sid Lockhart that there were "holes," "ruts", and "problems with the roadway" and that it was unsafe for vehicles traveling the posted speed limit of 35 m.p.h.).

Officer Paul Meigs of the Lanett Police Department testified that, when he drove onto the construction site the day of the

accident, "my vehicle patrol car bottomed out on one of the trenches. . . . The bottom of the car hit." R. 152. Officer Meigs was going "twenty or twenty-five miles an hour." *Id.* He testified that one could not "safely operate a vehicle going the speed limit" due to "the construction of the roadway." R. 153.

Officer Young agreed that, due to the roadway, a vehicle could not be safely operated at a speech of even 25 miles per hour. He testified that, while driving through the site the prior evening at 20 to 25 miles per hour, he had hit an unguarded steel manhole cover and almost lost control of his vehicle. R. 253. He described the "roadway condition" as "terrible," citing the "gravel all over the road" and the "horizontal-type trenches across the roadway." R. 254. Officer Young testified that the conditions the night of the accident were the "same . . . if not worse." *Id.*

Another witness, Sonya Mitchell, testified that when she drove on Magnolia Road at 20-25 miles per hour, her car's wheels were knocked out of alignment and its oil pan was broken. R. 652-54. Her car "bottomed out" 20 feet from the accident scene. *Id.*

Lemond's foreman, Darrell Morton, admitted that Magnolia Road was the most heavily travelled road in the project and that temporary asphalt or bituminous as a temporary level would have done a "better job" of keeping the gravel in the roadway. R. 442-44. He also acknowledged that, in covering up trenches on other jobs, Lemond had used temporary asphalt rather than crusher run. R. 419.

Eddie Hurston is a resident of Lanett living about three or four blocks from the accident scene. He was employed by Lemond and worked on Magnolia Road under the direct supervision of Lemond's foreman. Hurston testified that "[a]ll the time" Lemond had problems with rock being knocked out of the trenches. R. 473. Cars "would pass by and knock

gravel out of the holes. And people complained . . . that their car was getting tore up and knocked out of line and different things." R. 473-74. Hurston added that, after someone complained to himself and the Lemond foreman about damage to an automobile on Magnolia Road, the foreman said, "I'm tired of this bitching about these roads, and we want to go the cheaper way out." R. 474-75. Chris Wheeler was killed about a week later. R. 475.

Dorothy Jean Brooks lived on Magnolia Road and used it every day. She testified that in late May 1992 she hit a deep trench, stalling her car and knocking a hole in her radiator. R. 672-73. She testified that she told the person in charge on the site: "If you all don't get something done about this out here someone is going to get hurt or killed." R. 673. This conversation took place two weeks before the accident.

The trial court held that the contract between the city and Lemond was ambiguous on the issue of whether temporary asphalt rather than crusher stone was required to be used. Pet. App. A5-A7.[3] The court permitted respondent to call as an expert witness Dr. James Harold Deatherage, a professor in the department of civil engineering at the University of Tennessee. Dr. Deatherage had worked for nineteen years as a practicing engineer and as a contractor in construction and had drawn up

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[3] The contract provided:

G. Traffic Restoration

1. The Contractor shall backfill the trench and restore traffic as quickly as possible.

2. He shall either install a temporary bituminous pavement or the binder course, and maintain the temporary surface under traffic for at least 30 days.

3. After subjecting to traffic, he shall remove the temporary pavement and install the wearing course accurately finished to the street grade.

Pl. Ex. 4.

plans and specifications for projects dealing with sewer lines. R. 601-04. He testified that the contract required Lemond to use asphalt rather than crusher stone as filling material.[4] He added that, if stone were used, cars would "knock the gravel out . . . and it's going to create a dangerous condition." R. 610. "[I]t's nearly inconceivable that you could allow traffic to go down through there at a normal rate of speed or allow them to get onto an area where they're going to hit those kinds of depressions." R. 612. Jackson Smith, a superintendent with Lemond who was in charge of the project on Magnolia Road, admitted that "safety" was one reason to use temporary asphalt rather than crusher stone. R. 505.

b. *The Failure to Post Warning Signs.* In addition, the evidence showed that Lemond breached its duty to provide adequate construction warnings to motorists, particularly at night. The Alabama Supreme Court found that the road construction area was "unmarked." Pet. App. A3.

Officer Meigs testified that, due to the topography of the hill and roadway, he could not see the construction prior to entering the site. R. 184. Furthermore, "[t]here w[ere] no signs," blinking illuminating lights, or any warnings at all, on "either end" of the construction site. R. 162. Officer Young testified

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[4] "[T]here is a section in here that deals with traffic restoration. And basically it says that the contractor is to backfill the trench with the stone and then in order to get the traffic on it as quickly as possible. Then it says he shall either install a temporary bituminous pavement — asphalt, that's what that means — or the binder course. Now, there is some question as to what binder course is. But, if you turn back here just a couple of pages, binder course is defined. And in this case, binder course is a hot mix, bituminous paving that has to meet an applicable Alabama Highway Department specification they call a city mix. And so then the contractor is required to maintain that asphalt that is put on that ditch — and the reason for putting it up there is to keep the gravel from getting knocked out when traffic goes over it — for at least thirty days." R. 608-09.

that he never saw any warning signs, lights, flags, or other devices at nighttime at the construction site, either on the night of the accident or at any previous time. R. 258. Deputy Lockhart confirmed that there were no warning signs. R. 370-71.

Lemond's foreman testified that the company had an office approximately one mile from Magnolia Road at which there were a "gang" of signs. R. 385. Yet Lemond never put up any signs or warning devices at night. R. 385-87. The foreman testified that Lemond erected warning signs during the day but took them down at night. R. 393.

The contract provided that Lemond was to "[e]rect two (2) warning signs beyond limits of the project, one at least 1,000 feet and one at 500 feet in advance of any place on the Project where operations interfere with the use of the road by traffic, including all intermediate points where the work crosses or coincides with the road." Pl. Ex. 3. The foreman conceded that the company did not comply with this provision. R. 407.

The contract also provided, as Lemond's president acknowledged, that "[t]he contractor shall at his own expense maintain sufficient warning lights, traffic signs, or traffic cones and so forth on or along any of the portion of the street or alley which due to the contractor's operations are not in a normal condition to handle vehicular or pedestrian traffic." Pl. Ex. 3; R. 1351. The contract further specified that "the contractor shall be solely and completely responsible for conditions of the job site," "[i]ncluding safety of all persons and property affected directly or indirectly by his operations during the performance of the work in or about the site of the work, and this requirement shall not be limited in application to normal working hours but shall apply continuous twenty-four hours per day." Pl. Ex. 3.

3. *Proceedings Below.* At trial, petitioner declined to lay the foundation for a contributory negligence defense. Alabama

law creates a rebuttable presumption that children aged 14 and under are incapable of contributory negligence. R. 1532. In the words of the trial judge, petitioner "made a deliberate tactical decision" not to rebut the presumption. *Id.* ("didn't try to rebut it, didn't offer a shred of evidence that would go to that issue").

Instead, Lemond contended that it had done nothing wrong. None of Lemond's witnesses expressed any contrition or pledged to take corrective action in the wake of the tragedy. Lemond's only excuse for its failure to provide warning signs was — in the words of its foreman — that there was "no problem" with the road surface and that it was as "smooth as a table top." R. 407-08. The foreman denied receiving any complaints regarding the condition of Magnolia Road. R. 412.

Lemond's superintendent, Jackson Smith, testified that the company had put up a sign on the eastern end of Magnolia Road notifying west-bound travelers that road construction was underway. R. 498-500. But he was forced to admit that "somebody in management" in Lemond made the deliberate decision "[a]fter reading the specs" *not* to place a sign on the west end of the project notifying east-bound travelers (like Chris and Jason) of the construction. R. 500-01. Furthermore, Smith was forced to reveal that the sign on the east end disappeared during construction and was not replaced prior to the accident. R. 498.

The jury was instructed that it could not award compensatory damages, but only punitive damages: "such damages . . . should be measured by and should be in proportion to the gravity and nature of the defendant's wrong and shall not be measured by the value of the deceased's life." R. 1481.[5] "The

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[5] Contrary to petitioner's erroneous claim that the jury was "required" to impose punitive damages (Pet. 6), the truth is that the judge instructed the jury that the imposition of damages was "discretionary" and that it was free not to

purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." R. 1479. "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. The degree of reprehensibility of defendant's considered should also be considered." R. 1481. The jury was instructed that the plaintiff was required to prove punitive damages under a standard of clear and convincing evidence. R. 1480.

Although the jury was instructed that it could award damages based on petitioner's negligence as well as petitioner's wantonness, it was also told that, "if there's more culpability, then possibly there should be more damages than if there's less culpability." R. 1460. "Wantonness would be a greater degree of wrong in the case than negligence. And, if you determine that there was wantonness in the case, you could take that into account in assessing the amount of damages in the case." R. 1480.

The jury imposed a $3.5 million damage award. The trial court denied petitioner's motion for a new trial, explaining that "[t]he defendant in this case could certainly foresee that the failure to post warning signs and the maintenance of the roadway with large potholes or depressions in it could likely cause serious injury or death to travelers on the roadway. Both under its contract with the City of Lanett and under applicable law the defendant was under a duty to maintain this roadway in a reasonably safe condition and the jury was certainly entitled to consider its failure to do so as culpable and reprehensible

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impose any damages at all. R. 1479; *see also id.* (providing standards "[s]hould you award punitive damages").

conduct on the part of the defendant." Pet. App. A50.

On appeal, the Alabama Supreme Court did not even reach the constitutional question that petitioner seeks to present to this Court. The Alabama court held that "Lemond's argument on this issue lacks the specificity required in order for this Court to address it." Pet. App. A17. In any event, the Alabama Supreme Court then proceeded to hold that this case does not involve the imposition of punitive damages for "simple negligence" because petitioner was guilty of wanton behavior. *Id.* at A18-A19.

REASONS FOR DENYING THE WRIT

I. THERE IS AN INDEPENDENT AND ADEQUATE STATE-LAW GROUND FOR THE JUDGMENT

Petitioner admits that the Alabama Supreme Court "declined to address the constitutional issue" (Pet. 7-8) because the court held that the claim was inadequately presented. *See* Pet. App. A17 ("Lemond's argument on this issue lacks the specificity required in order for this Court to address it. Rule 28(a)(5), Ala. R. App. P.").[6] Petitioner does not, and cannot, deny that such a procedural rule is ordinarily the kind of adequate and independent state ground that bars this Court's review. The state court's decision "'indicates clearly and expressly' that the state ground is an alternative holding." *Sochor v. Florida*, 504 U.S. 527, 533 (1992) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)).

Petitioner's only response is to rely on a *separate opinion* by

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[6] Rule 28(a)(5) regulates appellate briefs and provides that "[t]he argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on."

Justice Maddox concurring in the judgment below to argue that its constitutional claim was properly presented in accordance with Alabama law. Pet. 8. But Justice Maddox focused on petitioner's *state-law* rather than *federal* claims. He explained that, "[a]s I read [Lemond's] argument, the appellant is pleading with this Court for justice and is asking *this Court* to re-examine much of *its* prior law relating to the award of punitive damages for simple negligence and to the question whether there should be apportionment of damages among joint tort-feasors." Pet. App. A31 (emphases added). Thus, petitioner's efforts to rely on Justice Maddox's opinion are wholly unavailing.

In fact, the only portion of Lemond's brief in the Alabama Supreme Court that referred to a relevant federal constitutional issue was a two-sentence, boilerplate snippet: "'The submission to the jury for the assessment of punitive damages based upon Lemond's simple negligence is in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America. No other state or federal court system allows punitive damages for simple negligence.'" Pet. App. A25 (quoting petitioner's brief in the Alabama Supreme Court).

We submit that this cursory language did not properly frame a federal claim. *E.g.*, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). In any event, the language is precisely the sort of sweeping, non-particularized language that the Alabama Supreme Court has consistently held is inadequate to trigger that court's review as a matter of state law. *E.g.*, *Alabama Power Co. v. Turner*, 575 So.2d 551, 553 (Ala.) ("Alabama Power's argument that the judgment violates its rights under the Fourth, Fifth, and Sixth Amendments does not identify any specific right it believes has been violated. Alabama Power has also failed to make any specific arguments regarding its constitutional challenges under any of these amendments. As a result, this Court will not address those

arguments."), *cert. denied*, 500 U.S. 953 (1991).

There is no need for this Court to review the Alabama Supreme Court's application of state procedure.

II. THE QUESTION PRESENTED IS NOT IN FACT RAISED, BECAUSE THE ALABAMA SUPREME COURT HELD THAT THIS IS NOT A NEGLIGENCE CASE

The petition is expressly predicated on the assumption that this case involves nothing more than "simple negligence." Pet. i, 9, 10, 13, 16 n.8, 18, 22. But the Alabama courts found otherwise. The Alabama Supreme Court specifically rejected "Lemond's argument that it was assessed punitive damages based on only negligent conduct, rather than on wanton conduct." Pet. App. A19. The court explained that "the record contains ample evidence to support a jury determination that Lemond's acts or omissions at issue in this case constituted wanton behavior." *Id.* at A18. The state supreme court noted that "'there was creditable evidence before the jury, and indeed it was undisputed, that there were no warning signs placed by the defendant on the approach to the construction area in the direction in which the car occupied by the decedent was being driven.'" *Id.* (quoting the circuit court's post-trial decision). Indeed, the evidence was that Lemond's management made a deliberate decision not to erect proper warning signs.

There was also evidence that Lemond had disregarded complaints about the unsafe condition of the road. The Alabama Supreme Court found that "'[t]here was further evidence before the jury that prior to the accident in question, complaints had been made to the defendant's superintendent in charge of construction about the holes in the road in response to which the superintendent was quoted as saying: "*I'm tired of the bitching about the road. We're going to take the cheapest*

way out." One week later the child was killed.'" *Id.* at A18-A19 (emphasis added and quoting the circuit court's post-trial decision).

Furthermore, there was evidence that Lemond had chosen to use a cheaper backfill of crusher stone, rather than the temporary asphalt that was required by its contract with the City. The trial court found that "the manner in which the construction was carried out in this case was designed to profit the defendant over and above what profit it would have normally received had it properly performed its obligations under its contract and under its duties to the public." Pet. App. A50-A51. In sum, there was clearly ample evidence of deliberate wrongdoing.

This Court ordinarily accepts a state appellate court's findings as to "what occurred at the trial" and "the basis of the verdict." *Minneapolis St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931). Accordingly, the Alabama Supreme Court's determination that this case involved wantonness rather than simple negligence means that the question presented is not properly before this Court.[7]

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[7] Lemond argues that the jury should not have been instructed that it could base its damages award on negligence and that the award must be vacated because "it is not possible for the jury to specify the basis of its verdict." Pet. 10. This argument is foreclosed by (a) Lemond's failure to request a special interrogatory that could have specified the basis of the verdict, and (b) Lemond's failure specifically to object to the imposition of damages on the basis of negligence. At trial, Lemond filed an amended answer raising a blanket defense that the imposition of punitive damages in this case would be unconstitutional. Pet. App. A55-A56. The trial court properly rejected that defense. Pet. App. A53-A54. At no time did Lemond move for a directed verdict on the ground that damages could not be awarded on the basis of negligence, nor did it object to the jury instructions insofar as they permitted the jury to award damages on the basis of negligence, Tr. 1489-95 (colloquy on jury charge), as it was required to do under Alabama law. Ala. R. Civ. P. 51 (party must object "before the jury retires to consider its verdict, stating

III. THE ALABAMA SYSTEM FOR IMPOSING DAMAGES IN WRONGFUL DEATH CASES DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner treats this case as a routine punitive damages case no different from the kind encountered by this Court in *Haslip*, *TXO*, and *Oberg*. It is anything but that. This case does not involve the common-law imposition of punitive damages. Since 1860, damages in *statutory* wrongful death actions in Alabama have been labeled "punitive" in response to the common-law ban on compensatory actions for wrongful death. *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). Other jurisdictions have addressed the matter in different ways; many have simply rejected the common-law approach.[8] For 130 years, however, Alabama has followed the course that petitioner now claims to violate the Fourteenth Amendment.[9] The Alabama Supreme Court has noted "[t]he sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life" as factors "accepted by our Legislature" in making a considered legislative judgment to retain the wrongful

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the matter to which he objects and the grounds of his objection"); *General Walker v. Dutton*, 401 So.2d 32 (Ala. 1981).

[8] *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 380 (1970) (extending a common law wrongful action to admiralty law, even though no such action existed by statute, and criticizing the traditional view of *Baker v. Bolton*).

[9] *See Central of Georgia Ry. v. Ellison*, 75 So. 159, 163 (Ala. 1916) (noting creation of punitive damage remedy by 1860 statute); *Alabama Great S.R.R. v. Burgess*, 22 So. 913 (Ala. 1897) (statute allows only punitive damages); *Savannah & Memphis R.R. v. Shearer*, 58 Ala. 672, 680 (1877) ("Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.'").

death scheme. *Alabama Power Co. v. Turner*, 575 So.2d at 554.

Because there are no "compensatory" damages in wrongful death cases in Alabama, under petitioner's view there could be no damages of *any* kind in Alabama wrongful death actions in the absence of a showing of intentional wrongdoing. Surely the Federal Constitution does not compel such an extraordinary result, which would produce severe under-deterrence and relegate cases involving the loss of human life to a status below that of suits regarding property damage or non-life-threatening injuries.

Petitioner's position is even more anomalous in light of the fact that the legal restrictions on the imposition of damages in Alabama wrongful death cases are far more severe than are limits on the imposition of compensatory damages in most States. The Alabama scheme works to the *benefit* of defendants.

Petitioner repeatedly asserts, without explanation, that Alabama wrongful death awards are "unlimited." Pet. 12, 13, 14, 22. To the contrary: wrongful death damages are closely circumscribed by a system that this Court approved in *Haslip*, 499 U.S. at 18-24, and that was recently strengthened in *Life Ins. Co. of Georgia v. Johnson*, No. 1940357 (Ala. Nov. 17, 1995), by the addition of even more detailed jury instructions. As illustrated by the post-trial hearing in this case (Pet. App. A47-A52), wrongful death awards are reviewed by Alabama courts under an 11-factor test taken from *Green Oil v. Hornsby*, 539 So.2d 219 (Ala. 1989), and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). These factors include:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the

> defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

499 U.S. at 21-22 This Court held that the application of these standards "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. . . . These standards have real effect when applied by the Alabama Supreme Court to jury awards." *Id.* at 22.

In *Haslip*, this Court also observed that "[t]he discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish." *Id.* at 20. Indeed, it appears that the Alabama scheme for imposing damages in wrongful death cases is more rigorous than the systems for imposing compensatory damages in many States.[10]

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[10] *E.g.*, *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541, 552 (Kan. 1990) (in cases involving noneconomic loss, "there is no clear method for measuring the loss and determining the amount of compensation due"); D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 544 (1973) ("there is almost no method at all" of measuring pain and suffering awards); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 906-08 (1991) ("Noneconomic damage awards are often quite large, and juries are given no specific guidance in deciding how large . . . .

Because "the value of human life has no measure," *Alabama Power Co. v. Turner*, 575 So.2d at 554, compensatory damages in wrongful death cases — particularly those involving children — would include a largely subjective component. For example, a jury asked to impose compensatory damages for the death of a 13-year-old child would be forced to engage in considerable speculation in assessing an essentially non-economic loss — the hedonic value of the enjoyment of life. Even determining the child's future earnings would entail conjecture as to whether he would have completed high school; whether he would have attended college; whether he would have gone on to graduate school; and what sort of employment he might eventually have chosen. Hence, it is not surprising that the award in this case is quite modest in size in comparison to compensatory damages often awarded for less serious harms.[11]

For all these reasons, the imposition of damages under Alabama wrongful death law does not warrant this Court's review.

IV. THE QUESTION PRESENTED HAS NO MERIT

Accepting petitioner's position would require this Court to overrule *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), where this Court rejected a constitutional challenge to

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If leaving the amount of punitive damages to the sound discretion of the jury offends the procedural guarantees of the fifth amendment, logically the common law discretion of juries to fix the amount of noneconomic damages is similarly defective.").

[11] *See, e.g., DeBiaso v. Illinois Central R.R.*, 52 F.3d 678, 688 (7th Cir. 1995) (upholding over $4 million in damages for loss of left arm, and listing Illinois verdicts of $2.3 million in damages for back injury that required no continued medical care and allowed victim to lift objects weighing as much as 50 pounds; $3.5 million for injured kneecap; and $9 million for arm amputation).

the very same Alabama policy of awarding punitive damages in wrongful death actions. This Court recognized the longstanding nature of Alabama's policy and that "the purpose of Alabama's wrongful death act is to strike at the evil of the negligent destruction of human life." *Id.* at 114, 116. This Court observed that many States had permitted the imposition of punitive damages without any personal fault at all through the doctrine of respondeat superior, *id.* at 115, and noted that the Federal Constitution did not prevent "the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs." *Id.* at 116. This Court concluded, with respect to the Alabama statute, that "[w]e cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive." *Id.*

Petitioner attempts to distinguish *Pizitz* as involving the law respondeat superior. Yet that factor cuts sharply *against* petitioner in this case. *Pizitz* involved a department store held liable under respondeat superior for the negligent act of an employee. 274 U.S. at 114. Thus, *neither* the employee nor the employer exhibited any deliberate intent to injure, and the employer itself was held liable *without any showing of any fault at all*. Such liability for punitive damages is much more attenuated than in this case, where Lemond itself was at least negligent, if not wanton, in its actions.

Petitioner claims also that "[q]uite a bit has changed in 68 years." Pet. 15. Yet the constitutional principles underlying *Pizitz* have remained the same. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Indeed, this Court recently reaffirmed *Pizitz* in the course of upholding the imposition of punitive damages on a theory of respondeat superior. *See Haslip*, 499 U.S. at 15 ("These and other cases in a broad range of civil and criminal contexts make clear that imposing such liability is not fundamentally unfair and does not in itself

violate the Due Process Clause.").

If punitive damages can be imposed in the absence of any showing of independent fault at all — as in the respondeat superior context or in products liability actions founded on strict liability in tort[12] — it is impossible to see how the imposition of punitive damages for negligence can raise any federal constitutional issue at all. Indeed, in *Smith v. Wade*, 461 U.S. 30 (1983), this Court canvassed the historical record and concluded that, by the time of the Fourteenth Amendment's framing, "[t]he large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent"; they permitted punitive awards "on a showing of negligence, recklessness, disregard for or indifference to the rights of others, and various other standards short of actual ill will or injurious intent." *Id.* at 45 & n.12.[13] Even acts done in good faith could provide the basis

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[12] *See, e.g.*, Annot., *Allowance of Punitive Damages in Products Liability Case*, 13 A.L.R.4th 52 (1994); *American Laundry Machinery Indus. v. Horan*, 412 A.2d 407, 418-19 (Md. 1980) ("punitive damages are available in product liability actions based upon the manufacturer's negligence").

[13] "'Malice,' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings." 461 U.S. at 41 n.8. "[I]t was often used without modification to mean what was sometimes called 'implied malice' — a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended." *Id.* In this sense, the term could be used even in negligence cases as a ground for punitive damages. *E.g., Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 289, 38 P. 903, 904-905 (1894). Moreover, "'willfulness' did not mean intent to cause injury, but only voluntary action." 461 U.S. at 41 n.8. "Wilful . . . generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. And wilfully does not

for punitive damages.[14]

Thus, petitioner is simply wrong is characterizing the Alabama approach as unique. Pet. 10.[15] In fact, the longstanding rule has been that the negligent breach of a duty endangering the public is deemed to be "gross negligence" and is a commonly accepted basis for punitive damages. This rule is of special relevance relevance to wrongful death actions in general, and to the instant case involving construction on a public road in particular, for here the threat to public safety was obvious. Accordingly, it could not have been error in this case to instruct the jury that punitive damages could be imposed on the basis of negligence. "For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may be perhaps considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885). In *Humes*, the negligent failure of a railroad to maintain fences and cattle guards was held to be a

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imply that an act done in that spirit was necessarily a malicious act. . . ." 30 American and English Encyclopedia of Law 529-530 (2d ed. 1905) (footnote omitted).

[14] *E.g.*, *Best v. Allen*, 30 Ill. 30 (1862) (defendant subject to punitive damages notwithstanding fact that he made entry in good faith, supposing that he had legal right to do so); *Raynor v. Nims*, 37 Mich. 34 (1877) (defendant's good faith belief that he had legal right to eject plaintiff does not prevent imposition of punitive damages).

[15] The only cited support for petitioner's sweeping statement that "Alabama is the only state in the union" to impose punitive damages on the basis of negligence, Pet. 10, proves nothing of the kind. *Tatum v. Schering Corp.*, 523 So.2d 1042, 1052-56 (Ala. 1988) (indicating only that other States permit compensatory damages in wrongful death cases).

sufficient basis for punitive damages.[16] In *Linsley v. Bushnell*, 15 Conn. 225, 235 (1842), the court held that punitive damages were appropriate where the defendant "wrongfully and negligently" left an obstruction on a public highway, causing a night-time collision with plaintiff's wagon — a scenario that is quite analogous to the instant case (putting aside, of course, the evidence of Lemond's wantonness).[17]

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[16] "The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment . . . ." 115 U.S. at 522.

[17] *See also Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26, 34 (1889) (affirming "the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to ensure safety in the movement of its trains," and explaining that if "the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed"); *Welch v. Durand*, 36 Conn. 182 (1869) (punitive damages for "culpable neglect"); *Maysville & Lexington R. Co. v. Herrick*, 76 Ky. 122, 127 (1877) (holding that the trial court correctly refused to instruct the jury that "willful or intentional wrong" was required to award punitive damages in a railroad accident case: "The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or 'reckless indifference to the safety of . . . passengers,' or 'intentional misconduct' on the part of the agents and officers of the company") (ellipsis in original); *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 219, 225 (1869) (punitive damages for "willful negligence" and "mere carelessness"); *Buckley v. Knapp*, 48 Mo. 152, 162 (1871) ("where there are circumstances of oppression, malice, *or* negligence, exemplary damages are allowed) (emphasis added); *Whipple v. Walpole*, 10 N.H. 130, 132 (1839) (exemplary damages appropriate in action for damages for defect in a bridge, which collapsed: "This is an action on the case; and brought for the neglect of a duty, in which the public at large have a deep interest. . . . Upon these structures we necessarily intrust our property and our persons; and by a neglect of this duty the lives of many are endangered. In

Finally, petitioner contends that this Court should impose an intent requirement by analogizing punitive damages to criminal punishment. Pet. 23-25. Although this Court has sometimes described punitive damages as "quasi-criminal," *Haslip*, 499 U.S. at 19, it has steadfastly declined to transplant the rules of criminal procedure into punitive damages law. *E.g.*, *Haslip*, 499 U.S. at 23 n.11 (refusing to impose any evidentiary standard higher than preponderance); *id.* at 23 (rejecting analogy to criminal fines in judging excessiveness); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (rejecting application of Excessive Fines Clause); *United States v. Halper*, 490 U.S. 435, 450 (1989) (rejecting application of Double Jeopardy Clause).

Punitive damages remain private civil remedies that do not involve public prosecution or the stigma of criminal punishment. Hence, they should not trigger any of the concerns that have sometimes led this Court to infer *mens rea* requirements in criminal cases. *E.g.*, *Staples v. United States*, 114 S. Ct. 1793 (1994). Moreover, petitioner mischaracterizes the nature of this Court's approach in criminal cases. This Court has held that, absent clear statutory language to the contrary, it will presume as a rule of construction that Congress meant to include a *mens rea* requirement in the law. This

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this very case, in consequence of the neglect of the defendants, three individuals were suddenly destroyed, and others exposed to most imminent peril."); *Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282, 296 (1872) ("Exemplary damages may be allowed not only in vindictive actions so called, such as assault and battery, false imprisonment, defamation, and the like, but also in cases based upon negligence."); *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 544 (1886) (allowing punitive damages against railroad where "there was no willful misconduct by the conductor" in ejecting passenger from train); *Earl v. Tupper*, 45 Vt. 275, 286 (1873) (exemplary damages available if conduct "was attended with malice, oppression, . . . *or* negligence") (emphasis added).

Court has never suggested that an intent requirement is constitutionally mandated. Indeed, this Court has upheld statutes imposing criminal penalties on the basis of strict liability, with *no* showing of fault at all. *E.g.*, *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (hazardous materials); *United States v. Dotterweich*, 320 U.S. 277 (1943) (impure food and drugs); *United States v. Balint*, 258 U.S. 250 (1922) (narcotics).[18]

These public welfare statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985). The Alabama wrongful death scheme similarly addresses important matters of concern to the community: activities resulting in the loss of human life. Accordingly, the Alabama system falls precisely within the area in which this Court has indicated, even in the criminal realm, that a showing of intent is not required for the imposition of liability.

For all these reasons, there can be no constitutional objection to the imposition of punitive damages in wrongful death cases on the basis of negligence.[19]

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[18] At common law, "[n]ot only were there crimes of recklessness or negligence (such as reckless homicide), but even crimes of intent commonly required only intent to do the criminal act (and, in some cases, knowledge that the injury would likely follow), rather than actual ill will or purpose to inflict an injury." *Smith v. Wade*, 461 U.S. at 43 n.9.

[19] Nor could there be any constitutional basis for an objection to the non-apportionment of damages. Petitioner cites no constitutional principle — and there is none — requiring States to apportion liability among multiple tortfeasors. Indeed, comparative fault statutes are of relatively recent origin. The traditional view was that each joint tortfeasor could be held liable for the entire result of his joint tort, regardless of his comparative degree of fault or whether he personally committed each of the acts that combined to make the

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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tort. William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 418 (1937); Thomas M. Cooley, Law of Torts 153 (2d ed. 1888) (each defendant is "compelled to assume and bear responsibility for the misconduct of all").